Fair Political Practices Commission

Memorandum

To: Chairman Randolph, Commissioners Downey, Karlan, Knox and Swanson

From: John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: Proposal to Merge Government Code section 1090, et seq., into the Political Reform Act

Date: June 24, 2003

A. Summary of Issues

The purpose of this staff memorandum is to seek Commission guidance on whether staff should investigate the merging of other conflict of interest provisions, including Government Code section 1090, into the Political Reform Act (the "Act" or "PRA").[1] There are a variety of conflict of interest laws that appear to overlap with the Act. Several interested parties have requested that the Commission consider a legislative proposal that would move these laws into the Act to give the Commission regulatory, advice and enforcement authority in these areas to provide greater service to the public. As will be discussed in this memorandum, this issue has a long history and raises many policy and implementation questions.

If the Commission agrees that staff should undertake this project, staff would focus on the following issues:

1. **Scope:** Which conflict of interest laws would apply? Would they be moved directly into the Act? Staff would need to research these issues and formulate a recommendation for the Commission.

2. **Funding:** Expansion of the Act would result in a significantly increased workload. Staff would need to analyze workload impact and ensure that any legislative proposal supported by the Commission would include adequate funding.

3. **Enforcement:** Staff of the Commission and of the Attorney General's office agree that the existing conflict of interest laws should not be diminished in any way. Additionally, staff would need to analyze how the existing enforcement provisions of different conflict of interest laws would impact the enforcement division and other enforcement authorities in the state.

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[1] Government Code sections 81000 - 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations. All future references are to the government code unless otherwise specified.

Staff recommendation: Staff recommends Commission approval for staff to proceed with this proposal. Staff would follow a multi-phased approach. This would include sufficient time to explore all aspects of the various laws under consideration and to seek full participation from persons with all viewpoints on the law. Staff recommends your approval of the proposed work plan (attachment 1) which staff would incorporate into the quarterly regulation/project calendar.

B. History and Background

The 1985 Effort: As early as 1985, this Commission has considered the overlap between the Act and Government Code section 1090 (discussed in detail below). Similar to the Act, section 1090 requires disqualification in some circumstances where a conflict of interest exists, and even provides more severe consequences than the Act in other circumstances. Section 1090 generally prohibits agencies from contracting in cases where a member of the governing body may have a financial interest in the contract. In addition to voiding a contract made in violation of its prohibition, section 1090 also provides for felony penalties.[2]

In a staff memorandum to the Commission dated October 25, 1985, the tension between the Act and section 1090 was discussed.

> "The Commission recognized that the two laws overlap, so that there are circumstances where only disqualification of the interested official is required by the Act, but the contract is completely prohibited under Section 1090. In addition, some contracts prohibited under Section 1090 do not even require disqualification under the Act. This can result in Commission staff advising an official that the contract is not prohibited, or that disqualification is not required by the Political Reform Act, when, in fact, the staff suspects that the contract may be absolutely prohibited by Section 1090. This situation causes confusion to officials and to members of the public alike. However, because Section 1090 is not part of the Act, the Commission cannot give advice under Section 1090."

At that time, staff identified four approaches to address issues arising over the overlap in the statutes.

> "1. Retain the Status Quo - This would continue the current situation. The Commission would provide advice to public officials only regarding compliance with the conflict of interest provisions of the Act. Many officials subject to Section 1090's provisions would have no viable avenue for obtaining definitive advice regarding compliance with its provisions. (The Attorney General is the only definitive source of advice on 1090.[3] That office does not write opinions for certain city or other local

[2] Reference to 1090 in isolation may be misleading. The comprehensive conflict-of-interest scheme starts at section 1090, and includes 1091, 1091.1, 1091.2, 1091.3, 1091.5, 1092, 1092.5, 1093 - 1098.

[3] It should be noted that while the Attorney General's Office does provide advice on section 1090 and other nonPRA sections, this advice is informal only and confers no protection for the requestor. In contrast, Commission formal written advice provides immunity barring enforcement actions in the future.

officials.) Enforcement of Section 1090 would remain exclusively the dominion of district attorneys, with felony criminal sanctions available to them. Section 1090 will continue to apply in some instances where the Act does not, and vice versa. In certain other circumstances, the two laws' provisions would overlap and the conduct required of an official under each would differ; however, compliance with one law will not preclude compliance with the other law's provisions."

"2. Incorporate 1090 Intact into the Political Reform Act - A second approach would be to incorporate Section 1090 unchanged into the Political Reform Act, keeping all the provisions defining remote interests, the felony penalties, the enforcement mechanism, and the possibility of voiding of contracts. This would provide one-stop-shopping for advice without changing 1090 at all. However, all of the inconsistencies between 1090 and the Act would remain, as well as the myriad exceptions which have been added to 1090 over the years. Under this approach, it would be necessary to decide what effect Commission advice would have upon the validity of contracts (contracts which violate 1090 are void). Probably the best solution would be to provide that Commission advice could give an official certain types of personal immunity from criminal prosecution or other penalties, but would not prevent a court from declaring a contract to be void.

"3. Incorporate Modified 1090 into the Political Reform Act - A third possibility would be to incorporate Section 1090, basically intact, into the Political Reform Act, making only minor changes to blend the two laws into a more harmonious unit. This approach would probably include simplification of the list of exceptions to Section 1090, which is currently awkward to apply and growing longer each year.

"4. Major Revision to Both 1090 and the Political Reform Act - A fourth approach would involve rewriting both laws to incorporate the basic concepts of each into a integrated statutory scheme. Such a scheme might establish two classes or categories of conflicts - those which would be treated as felonies and which would automatically make a contract or other governmental action void (along the lines of current 1090 violations), and those less serious conflicts which would be treated as misdemeanors, and which would not automatically result in the contract or action being void. Only the Act's current provisions (Section 9l003(b)) permitting voiding of a decision under limited circumstances would apply to such decisions. Obviously, an approach such as this would be a major undertaking which would require considerable thought by those who were drafting the proposal."

While not clearly reflected in the Commission's minutes, ultimately, the Commission chose not to proceed with the amendments. According to Deputy Attorney General Ted Prim,

who was involved in the project at that time, the project died, in part because the Attorney General's office opposed the proposal.[4]

The McPherson Commission: In January 1, 1999, the Bipartisan Commission on the Political Reform Act of 1974 was created and charged with assessing whether administrative, regulatory, procedural, and/or clarifying changes to the Act would provide for a more efficient and effective implementation of the Act. The final report of the Bipartisan Commission included two recommendations regarding section 1090.

> "RECOMMENDATION NO. 16 Consolidation of State Conflict Codes Under One Agency. All state conflict of interest statutes should be consolidated into a single code or body of law to be interpreted and enforced consistently by a single state agency. *Findings Supporting Recommendation*: Based upon the discussions and deliberations of the Commission, the Bipartisan Commission finds that the existence of multiple conflict of interest provisions sprinkled throughout various Codes creates unnecessary confusion in the minds of public officials who strive to obey the law but who often have no idea what Code to review or whom to ask for advice.
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> "The Bipartisan Commission therefore recommends that the Legislature consolidate all conflicts of interest laws into one Code, presumably the Political Reform Act, to be interpreted and enforced consistently by a single authority.
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> "For example, a public official wondering whether he or she has a conflict of interest in a particular governmental decision must individually consider the Political Reform Act, Government Code Section 1090, the conflict of interest provisions of the Public Contracts Code, and a number of other agency-specific and local conflict of interest provisions. These provisions are administered or enforced by different agencies such as the FPPC, the California Department of Justice, the courts, and numerous local agencies. The public official must determine for himself or herself what agency to approach for an answer to a conflict of interest question. For example, a question about the Political Reform Act conflict of interest rules must be addressed to the FPPC while a question about a Section 1090 contract issue must be addressed to the Department of Justice.[5] The Bipartisan Commission therefore recommends that the Legislature consolidate all conflicts of interest laws into one Code, presumably the Political Reform Act, to be interpreted and enforced consistently by a single authority.

[4] Support for the merger of the two bodies of law was not universal. In addition to the Attorney General's office, both the County Supervisors Association of California (CSAC) and the District Attorneys Association (DAA) were hesitant to change the status quo, as reflected in their respective letters to the Commission (dated August 26, 1985 and September 6, 1985). The DAA was concerned of potential negative effects on their ability to prosecute violations of 1090 and the CSAC was concerned that administrative regulations would create ambiguity.

[5] See footnote 3.

> "RECOMMENDATION NO. 17 Centralization of Local Conflict Rules Under the FPPC. All local conflict of interest codes should be centralized and consolidated under the authority of a single state agency—the FPPC. *Findings Supporting Recommendation*: Based upon the discussions and deliberations of the Commission, the Bipartisan Commission finds that the Political Reform Act's conflict of interest provisions (Government Code Section 87300 et seq.) should be amended to centralize and consolidate all state and local conflicts of interest codes under the authority of a single state agency, the FPPC. The current concept, which dates back to the Political Reform Act's adoption by the voters in 1974, decentralizes responsibility for the formulation and adoption of the conflicts of interest codes to individual jurisdictions and agencies. Although the FPPC is empowered, pursuant to Government Code section 87312, to provide technical assistance to agencies in the preparation of conflict of interest codes, the FPPC has no authority to direct these efforts in a standard and uniform manner. The existing decentralization can lead to a myriad of inconsistent results. For example, one local government entity may designate a public defender as a position with decision-making authority, while another entity may not. Moreover, the FPPC's present lack of authority to examine and direct the conflict of interest efforts of local government agencies undermines the role of the FPPC, which is the one agency with the technical expertise to administer this highly technical area of law. The Bipartisan Commission urges the Legislature to consider legislation to give the FPPC more authority to ensure that all conflict of interest codes for all agencies and all jurisdictions are properly regulated and administered."

The 2000 Effort: In March 2000, a second effort to link section 1090 to the Political Reform Act was initiated by CalPERS. In their March 6, 2000 letter they stated:

> "CalPERS has identified some problems in the day-to-day application of Government Code section 1090. First, CalPERS is concerned with the Attorney General's interpretation that members of Boards are 'conclusively presumed' to have participated in the making of contracts by their staff. Second, CalPERS thinks that the public would benefit from a definition of when an official is 'financially interested' in the making of a contract. For example, the definition could mirror the Political Reform Act's definition of 'financial interest.' Last, CalPERS believes the public may benefit from a legislative change that would allow the Fair Political Practices Commission to provide advice regarding Government Code section 1090 and pass regulations interpreting Government Code section 1090."

CalPERS convened several meetings with various members of the public, representatives of state agencies, and a representative of the Attorney General's office. Commission staff attended several of these meetings as observers. While the Commission and the Attorney

General's office have not committed to any specific approach in dealing with this issue, all attendees agreed that it would be beneficial to have the Commission explore this proposal.[6]

The purpose of this memorandum is to once again present this issue to the Commission. As you will note from the discussion of 1090 and the Act below, there is a significant overlap between the application of the two conflict-of-interest laws. A search of advice letters in the Westlaw database revealed approximately 258 Political Reform Act advice letters that make mention of section 1090. Moreover, there continues to be confusion about terminology, and no single state agency resource to construe the 1090 in regulation or by advice letter.

C. Political Reform Act

In 1974, the voters in California adopted Proposition 9. Proposition 9 was a comprehensive political reform measure that enacted the Political Reform Act and created the five-member Fair Political Practices Commission. One of the core areas of reform was the prevention of conflicts of interest.[7]

> "The act seeks to protect all citizens from those who might govern in a financially self-interested manner. Public officials should perform their duties in an impartial manner free from the pressures and bias caused by their own financial interests. (§ 81001, subds. (a) and (b).) To implement those goals, the assets and income of public officials which may be materially affected by their official actions must be disclosed. In appropriate circumstances the officials should be disqualified to avoid conflicts of interest. (§ 81002, subd. (d).) To this end the PRA should be liberally construed to accomplish its purposes. (§ 81003.) The PRA seeks to bring a degree of credibility to government by providing that those who hold a public trust must act, and appear to act, ethically. Erosion of confidence in public officials is detrimental to democracy. The election and appointment of ethical public officials depends upon an informed, interested and involved electorate. To maintain confidence and to avoid public skepticism, conflicts of interest must be shunned." (*Consumers Union of U.S., Inc. v. California Milk Producers Advisory Bd.* (1978) 82 Cal.App.3d 433, 443.)

For purposes of the Act, a conflict of interest exists if all of these criteria are met.

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[6] Comment letters (from CalPERS and the Leagues of Cities) are attached at attachment 3.

[7] The purposes of the conflict-of-interest provisions of the Political Reform Act are set forth in section 81001 and 81002. They are:

"(b) Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them .... [Section 81001(b).]

"(c) Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided ...." [Section 81002(c).]

1. The individual is a "public official."

In this step, the threshold determination is made as to whether the individual comes within the purview of the Act in his or her official capacity.

2. The public official is making, participating in making, or influencing a governmental decision.

In this step, the nature of the public official's participation in a given governmental decision is examined to assure that he or she is actually involved in making a governmental decision, as opposed to a private decision, within the meaning of the Act.

3. The public official has one or more of the following "economic interests" involved in the decision.

In this step, the economic interests that may give rise to a financial interest in a given governmental decision are identified. The various economic interests of a public official are as follows:

- *Business Interests.* An official has an economic interest in a business entity in which the official, the official's spouse, the official's dependent children, or anyone acting on the official's behalf has invested $2,000 or more, or in which the official is a director, officer, partner, trustee, employee, or holds any position of management.

- *Real Property.* The official has an economic interest in real property in which the official, the official's spouse, the official's dependent children, or anyone acting on the official's behalf has invested $2,000 or more (including leasehold interests).

- *Sources of Income.* The official has an economic interest in any person, whether an individual or an organization, from whom the official has received (or by whom the official has been promised) $500 or more in income within the 12 months prior to the decision.

- *Sources of Gifts.* The official has an economic interest in anyone, whether an individual or an organization, which has given the official gifts totaling $340 or more within the 12 months prior to the decision.

- *Personal Finances.* The official has an economic interest in the official's personal expenses, income, assets, or liabilities, as well as those of the official's immediate family--this is known as the "personal financial effects" rule. If the decision will affect the official's personal finances by $250 or more, then a conflict of interest exists.

4. Determine whether the public official's economic interests are directly or indirectly involved in the decision to identify the materiality standard.

In this step, the nature of the involvement of the public official's economic interest in the governmental decision is examined. Depending on the type of economic interest involved, different standards are applied to determine whether an economic interest is directly or indirectly involved in a governmental decision. Generally, where an economic interest is directly involved in a governmental decision, more stringent rules are applied in determining whether a decision has a disqualifying effect on the official's economic interest under subsequent steps in the conflicts analysis.

5 and 6. Determine if the financial effect of the decision on the public official's economic interests be material and reasonably foreseeable.

While these are distinct steps in the analytical framework, they are usually combined to determine whether a decision will have a reasonably foreseeable material financial effect on the official's economic interest.[8]

D. Government Code section 1090

However, the Act's conflict-of-interest provisions are not the only conflict-of-interest laws that may apply to public officials in the state. In many cases, these various other conflict of interest laws may overlap and may all apply to the same decision. One of the most well known conflict of interest laws outside of the Act is in section 1090 et seq.

> "...Government Code section 1090, which codified the common law prohibition of public officials having a financial interest in contracts they make in their official capacities." (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th1205, 1230.)

The Office of the Attorney General offers a guidebook to the various conflict-of-interest laws that a public official must consider (last updated in 1998). The summary of section 1090 elements in this memorandum is drawn from that publication.[9]

[8] Steps seven and eight involve exceptions to the conflict-of-interest rules. There are two exceptions with many variants. These exceptions are applied to allow a public official with a conflict of interest to still participate in the governmental decision. The first of these exceptions is for decisions where the effect on the public official's economic interest(s) is not different from the effect on the economic interest(s) of the "public generally." The second exception is applied where the participation of the public official is "legally required."

[9] This memorandum borrows heavily from the Attorney General's 1998 publication (Conflict of Interests), with respect to text, authority and examples. We have added new discussion of provisions added to section 1090 after 1998.

1. Persons Covered

Virtually all board members, officers, employees and certain consultants[10] are covered. This includes council members, county employees, contract city attorneys, school boards, and members of advisory bodies.

2. Contract Decisions

A contract must be finalized before a violation of section 1090 occurs, although determination of whether section 1090 is at issue should be made prior to consideration of the contract. In most cases, whether a contract is being entered into is relatively easy to determine. The making of the contract has been construed to include preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications and solicitation for bids, as well as decisions to modify, extend or renegotiate a contract.

In some cases, this determination is more difficult. For example, the term "contract" in section 1090 has been construed to apply to a development agreement between a city and a developer, and in one case to a hospital district's paying of travel expenses for a board member's spouse.

3. Participation

Once a contract is made, section 1090 would be violated if the official had participated in any way in the making of the contract. Generally, it is a question of fact as to whether an official was involved in the making of the contract. So long as the employee plays no role whatsoever in the contracting process (either because such participation is outside the scope of the employee's duties or because the employee has disqualified himself or herself from all such participation), the employee's agency is not prohibited from contracting with the employee or the business entity in which the official is interested.

However, if an official is a member of a board or commission which executes the contract, the official is conclusively presumed to have participated in the making of the contract. This is true even if the official abstains from all participation in the decision, or in one case, even where a member resigned from the council prior to its vote on the contract.

4. Presence of Requisite Financial Interest

For section 1090 to apply, the public official in question must have a "financial interest" in the contract in question. The term "financial interest" is not specifically defined in the statute and the statutory definition in section 87103 does not control application of section 1090. Historically, this concept has been broadly interpreted by the courts. A financial interest has been found under the following circumstances:

[10] See e.g., *NBS Imaging Systems Inc. v. State Board of Control* (1997) 60 Cal.App.4th 328, footnote 13.

	Section 1090	**Political Reform Act**[11]
1	The official sold his business to his son in return for a promissory note secured by the business. Because the business was security for the mortgage, a conflict existed when county printing contracts were awarded to the business. *(Moody* v. *Shuffleton* (1928) 203 Cal. 100.)	Under the Act, the son would be a source of income and an economic interest. The official would have been required to abstain from the decisions concerning the contract with his source of income.
2	An official/stockholder in a corporation had an interest in the contracts of the corporation. *(Moody* v. *Shuffleton* (1928) 203 Cal. 100.)	An investor in a business has an economic interest in that business and the official would be required to disqualify himself.
3	An employee of a contracting party is subject to 1090.	Both employment and receipt of income would be "economic interests."
4	An attorney, agent or broker of a contracting party is subject to 1090.	Both employment and receipt of income would be "economic interests."
5	A supplier of services or goods to a contracting party is subject to 1090.	Receipt of income from the contracting party would be an "economic interest."
6	A landlord or tenant of a contracting party is subject to 1090.	Landlords would have an interest in the tenant by virtue of income received. The tenant would possibly have an interest in the landlord if the tenant paid less than fair market value such that the landlord was providing a gift to the tenant.
7	Officer or employee of a nonprofit corporation which is a contracting party.	Merely serving as an officer or employee would not make the nonprofit an economic interest. However, assuming if paid for the service, the nonprofit would be an economic interest.

[11] For comparison purposes, we discuss whether the official has an economic interest under the Act. An official has a financial interest under the Act only where a decision will have a material and foreseeable financial effect on an economic interest that is distinguishable from the effect of the decision on the public generally.

8	Sale of property from a council member through an intermediary corporation to the city constituted a violation. The court found that the purchase by the corporation/intermediary of the council member's land was part of a pre-arranged agreement with the city.[12] Under these circumstances, the court concluded that the city council member was financially interested in the contract. The court ordered the council member to forfeit the money he was paid for the property, and permitted the city to retain the property. (*Thomson* v. *Call* (1985) 38 Cal.3d 633.)	Under the Act the intermediary corporation would have been a source of income to the official and the official would be disqualified from making, participating in making, or influencing the decision.
9	A public official who was a shareholder in an insurance brokerage firm had a financial interest in the firm despite assurances that payments under the contract with the county would not be used to pay the official/shareholder's compensation or the business expenses of the brokerage firm. The court concluded that the volume of business to the firm affected the value of the interested official's investment in the firm. Thus, to the extent that the firm benefited by increased business, so did the official, despite the fact that the benefit was in some way indirect. (*Fraser-Yamor Agency, Inc.* v. *County of Del Norte, supra* (1977) 68 Cal.App.3d 201)	Under the Act the official would have an interest in the firm. However, if neither the firm nor the official's personal finances were affected by the decision on the contract (not even by one penny) the official could participate. The issue under the Act would be whether the financial effect of the decision on the official or on the firm would be reasonably foreseeable.

[12] Had there been no discussions between the city and the corporation regarding the property to be acquired for the park prior to the corporation's acquisition of the council member's property, section 1090 may not have been violated.

10	The county assessor participated with the former county employee in demonstrations and meetings by which representatives of South Carolina were convinced to purchase the county's computer appraisal program. The former employee was paid $6,000 as a consultation fee upon execution of the purchase and he paid $3,000 to the assessor. The court held that the evidence was sufficient to infer a promise to split the fee and that this was a prohibited financial interest in the purchase contract under section 1090. *(People* v. *Vallerga* (1977) 67 Cal.App.3d 847.)	Under the Act the official would most likely have a conflict of interest based on financial effects on his or her personal finances. The official may also have a conflict of interest premised on financial effects on the contractor if the income in the contingent consulting contract was "promised" income.
11	A city employee involved in purchasing books awarded contracts to a corporation in which he and his wife were the primary shareholders. (*People* v. *Sobel (1974)* 40 Cal.App.3d 1046.)	The employee would have an economic interest in the corporation and would have to abstain from participating in the contract decision.
12	A debtor-creditor relationship constituted a financial interest within the meaning of section 1090. (*People* v. *Watson* (1971) 15 Cal.App.3d 28, debt owed to official *Moody* v. *Shuffleton* (1928) 203 Cal. 100, official is mortgagor to contractor)	Under the Act a debt to an official is considered promised income if it is legally enforceable. Where the contractor is a source of income to the official, the official will also be required to abstain.
13	Councilmember's spouse was a partner in a law firm which represented the contracting party in matters unrelated to the contract. The spouse's community and separate property income is attributed to the official.	Community property income to the spouse of a public official is deemed income to the public official under the Act. Since the contractor would be a source of income, the official would be disqualified. However, income received as separate property by the spouse of an official would not be considered income to the official.
14	A hospital district was prohibited from paying the expenses for a board member's spouse to accompany the board member to a conference. The opinion concluded that the board member had a financial interest in the payment of his or her spouse's expenses.	Under the Act, the official would be required to abstain from this decision since it affects his or her personal finances.

15	The compensation package for the city attorney and other city personnel (tied to increases in land value, based on the approval of land developments) made them financially interested in all land development contracts to which the city was a party.	It is unclear whether this situation would create a conflict of interest, or would fall into the exception for government salary.
16	A local mental health director was in violation of section 1090 where he also was employed by the contract provider of mental health services to the county. In his official position, he was required to advise the county board of supervisors regarding contracts for mental health services, and in his private capacity he received a fixed yearly salary from the contract provider. Thus, he was interested in the county's contracts for mental health services in both his public and private capacities.	Under the Act, the contract provider would be considered a source of income and the official would have to abstain.

4. Temporal Relationships[13]

An official who has contracted in his or her private capacity with the government before the official is elected or appointed does not violate the section. The official's election or appointment does not implicate 1090. As noted above, however, renegotiating a contract is considered a new contract under 1090. Thus, the official must resign from office or eliminate the private interest to avoid violating section 1090.

5. Exceptions to the General Prohibition

The government code and case law provide a series of express exemptions and exceptions to the 1090 rule. We have provided a general discussion of these provisions in Attachment 2.

6. Penalties

The most dramatic difference between the effect of a conflict of interest under the Act and the effect of a conflict of interest under 1090 are the consequences. A contract made in violation of section 1090 is void. Any payments made to the contracting party, under a contract made in violation of section 1090 must be returned and no claim for future payments under such contract may be made. In addition, the public entity is entitled to retain any benefits which it receives under the contract. (*Thomson* v. *Call*, *supra*, 38 Cal.3d at p. 650.)

[13] This temporal requirement is also evident from many of the exceptions discussed below.

Moreover, any person, who is found guilty of *willfully* violating any of the provisions of section 1090 et seq., is punishable by a fine of not more than $1,000 or imprisonment in state prison. (Section 1097.) For an official to act "willfully," his or her actions concerning the contract must be purposeful and with knowledge of his or her financial interest in the contract. (*People* v. *Honig* (1996) 48 Cal.App.4th 289, 334-339.) Additionally, such an individual is barred from holding any office in this state. (Section 1097.)

E. Other Laws

There are a variety of other conflict-of-interest laws that raise similar issues. The Attorney General's conflict-of-interest guide discusses the following:

- *Conflict of interest limitations on state contracts.* Public Contracts Code section 10410 prohibits state officers or employees from engaging in activity (employment or other enterprise) for compensation (or in which the official otherwise has a financial interest) if the enterprise is sponsored or funded, in whole or in part, by any state agency or department through a contract. Public Contracts Code section 10411 provides a "revolving door." The prohibition period may be one year or two depending on the post-employment activity.

- *The constitutional prohibition on the acceptance of passes or discounts from transportation companies.* The Constitution requires forfeiture of office if public officers (not employees) receive a free pass or discount from a transportation company (foreign or domestic). This provision applies whether the discount is for public or personal business.

- *Incompatible activities for state and local officers and employees.* All state agencies and local agencies maintain a list of activities that are deemed incompatible with public service. Generally, these activities are not "illegal" but rather are considered conditions of employment and subject to discipline through the standard personnel process. Even on the state level, these "incompatible activities statements" vary greatly since they are normally tailored to the agencies duties. For example, the "incompatible activities statement" for the Board of Equalization emphasizes outside tax work, while our own emphasis is outside political activity.

- *The common law doctrine of incompatible offices.* This doctrine recognizes that holding two offices simultaneously can be per se incompatible and the official will be required to vacate one of the offices. Generally, when new issues arise, it is a fact based analysis as to whether there will be a potential conflict or overlap in the functions or responsibilities of the two offices.

- *The common law doctrine against conflicts of interests.* While for the most part subsumed under the Act's provisions, another conflict-of-interest doctrine existed under common law. The Attorney General's office still believes this "common law" conflict of interest rule is applicable in situations where the Act is not. While not refined in statute or regulation, the basic rule is that "[a] public officer is impliedly bound to exercise the

powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public." (*Nobel v. City of Palo Alto* (1928) 89 Cal.App. 47, 51.)

F. Project Proposal

As discussed above, staff seeks Commission guidance on whether staff should investigate the merging of other conflict of interest provisions, including section 1090, into the Act. If the Commission agrees that staff should explore this project, staff would focus on the following issues.

1. Scope: As discussed above, there are numerous conflict-of-interest laws that appear to overlap with the Act. In light of the concern on the inability to seek advice about these other laws, the Commission may choose to move one or more of these laws into the Act. Staff would need to research these issues and formulate a recommendation for the Commission.

2. Funding: Obviously, expansion of the Act results in greater workload. Even if the Commission agreed to support a legislative amendment to add existing 1090 et seq. to the Act, this could double the amount of work that the agency already directs toward implementation of the existing conflict-of-interest rules. Any Commission supported legislative proposal would necessitate a funding request.

3. Enforcement: Staff of the Commission and of the Attorney General's office agree that exploring the movement of sections 1090 et seq. into the Act may be beneficial, but would also agree that the conflict of interest law should not be diminished in any way. Additionally, this would have unknown impacts on the enforcement division, depending on how the penalty provisions of 1090 were incorporated into the Act.

Staff Recommendation: Staff recommends Commission approval for staff to proceed with this proposal. Staff would follow a multi-phased approach. As a Commission adopted project, staff would ask for sufficient time to explore all aspects of the various laws under consideration, and to seek full participation from persons with all viewpoints on the law, and its incorporation into the Act. Only after this analysis is complete would staff request direction from the Commission to draft a legislative proposal. We have attached a tentative work plan which staff would propose to incorporate into the quarterly regulation/project calendar.

Attachments

1. Calendar

2. Exceptions and Exemptions

3. Comment Letters